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IN THE

Supreme Court of the United States

October Term 1976

No. 76-385

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, COUNTY OF SANTA FE, NEW MEXICO

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Statement

Respondent UNC's Brief in Opposition ("Opposition") contains many material misstatements and distortions, necessitating this Reply.

Argument

Jurisdiction

UNC asserts that this Court lacks jurisdiction because the New Mexico Supreme Court may have rested its order on an alternative "independent non-federal ground" (Opposition, p. 3). Specifically, UNC argues that the New Mexico Supreme Court may not have reached GAC's claim that state courts lack power under the Constitution to enjoin federal court proceedings because it may have decided that under New Mexico procedure a writ of prohibition was inappropriate and that GAC had to seek redress through an interlocutory appeal (Opposition, pp. 3-5).

This argument is frivolous.

1. The total answer to UNC's argument is that its alleged alternative ground for the decision is neither "independent" nor "non-federal". UNC correctly stated New Mexico law in its Brief to the New Mexico Supreme Court when it conceded that (p. 8) "the purpose of prohibition is . . . to prevent a court from acting where it has no jurisdiction or is acting in excess of the jurisdiction it does have. . . ." *

Therefore, had the New Mexico Supreme Court decided, as UNC suggests, that prohibition was not the proper procedure, it necessarily would have found that the trial court did have jurisdiction to enjoin federal court proceedings—and thus would have decided the precise federal question now raised by GAC.

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* Brief of UNC in the Supreme Court of New Mexico, dated May 26, 1976 ("UNC Supreme Court Brief"). A copy of that Brief has been lodged with the Clerk of this Court, and the excerpts cited in this Reply appear in Appendix A annexed hereto. *See also State* v. *District Court of McKinley County*, 41 N.M. 658, 73 P.2d 333 (1937); *Hammond* v. *District Court*, 30 N.M. 130, 228 P. 758 (1924); *State ex rel. Harvey* v. *Medler*, 19 N.M. 252, 142 P. 376 (1914).

2. UNC is well aware of the fallacy in its argument. UNC never contended below that prohibition was not the proper procedure for review of the injunction in so far as it ran against federal court procedings. In its brief it merely argued that prohibition was not the proper procedure *to review the injunction in so far as it ran against state court and arbitration proceedings or to review Judge Felter's refusal to dismiss for failure to join indispensable parties under Rule 19.* UNC counsel, at the hearing before the New Mexico Supreme Court, did not depart from the positions taken in its brief.*

The excerpt from the hearing before the New Mexico Supreme Court relied upon by UNC (Opposition, p. A-2) in which Justice Montoya questioned the propriety of prohibition inexplicably omits the introductory statement of GAC counsel (Mr. Robb) which clearly shows that the ensuing colloquy cited by UNC related only to the injunction against state court and arbitration proceedings and

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* UNC stated in its UNC Supreme Court Brief, pp. 7-9:

"Insofar as the injunction runs against *state court litigation and arbitration proceedings,* General Atomic is seeking review of the merits of the injunction. This is not the function of prohibition.

". . . .

"Thus, we see that General Atomic is attempting to obtain a review on the merits of *that portion* of the injunction which is directed toward *state litigation and arbitration proceedings. That kind of review* is not the function of prohibition." (Emphasis added.)

Section 1 of the UNC Supreme Court Brief entitled, "THE DISTRICT COURT HAD *JURISDICTION* TO ENJOIN GENERAL ATOMIC FROM INSTITUTING ACTIONS IN *FEDERAL COURT*" (emphasis added), dealing with the injunction against federal proceedings, raises no question whatsoever as to the propriety of prohibition. *See also* paragraph 12 of UNC's Response to Alternative Writ, dated April 30, 1976, excerpted in Appendix B annexed hereto. A copy of that Response has been lodged with the Clerk of this Court.

to the Rule 19 decision. That introductory statement is set forth in Appendix C hereto.*

Thus neither the parties nor the New Mexico Supreme Court ever raised or considered the alleged "ground" now suggested by UNC.**

3. In any case, it also is clear that no appeal lay under the New Mexico interlocutory appeal statute, § 21-10-3, N.M.S.A. 1953 (Supp. 1975), to review the propriety of an injunction collateral to the merits of the New Mexico lawsuit and affecting GAC's right to proceed in federal courts. As UNC concedes (Opposition, p. 4), the New Mexico statute was enacted as an analogue to 28 U.S.C.

* GAC's argument at the hearing was divided between Mr. Eastham, who spoke first on the lack of power of the Santa Fe Court to enjoin federal proceedings (Appendix to Petition, p. 15a), and Mr. Robb, who then addressed the other questions. *See* Appendix C hereto.

** UNC's argument (Opposition, p. 5) that GAC is estopped to challenge the Injunction because GAC invoked the Santa Fe Court's jurisdiction by itself seeking an injunction and that the New Mexico Supreme Court could have rested its decision on that ground is even more frivolous. GAC at all times maintained that the court lacked jurisdiction to enjoin federal court proceedings. The portion of the record relied upon by UNC to show that GAC sought to have the injunction apply equally to UNC shows nothing of the kind. To the contrary, it shows that GAC *objected to the injunction proposed by UNC* on the ground, among others, that it was unfair to restrict GAC in a way that UNC was not restricted. Judge Felter, "without making any ruling on [GAC's] position", responded to this *objection to any injunction at all* by making the injunction run equally against both parties. *See* the pertinent excerpt from the hearing before Judge Felter annexed hereto as Appendix D.

Indeed, had the New Mexico Supreme Court held that GAC's actions in effect conferred jurisdiction on the Santa Fe Court to enjoin federal proceedings, such a ruling would itself raise the same federal question involved here, since litigants cannot invest a court with jurisdiction exceeding the constitutional limits of its power. *See American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1950).

§ 1292(b). *See* Note, *New Mexico's Analogue to 28 U.S.C. § 1292(b): Interlocutory Appeals Come to the State Courts*, 2 New Mexico L. Rev. 113 (1972). § 1292(b) was obviously never intended to apply to injunctions, which in federal practice are appealable as of right.* Moreover, an interlocutory appeal under either § 21-10-3 or § 1292(b) is proper only where it involves a "controlling" question of law, resolution of which may "materially advance the ultimate termination of the litigation". Since appellate review of the Injunction could neither affect the outcome nor materially advance the termination of the Santa Fe litigation, an interlocutory appeal obviously was unavailable** and a writ of prohibition was the proper procedure.

We emphasize in conclusion that the Opposition does not dispute that the questions presented by this Petition are wholly separate from and independent of the merits of the state court action in which the Injunction was issued, and that review of a final judgment in that action would not provide an opportunity for petitioner to obtain review of the Injunction. The Injunction is thus clearly a "final judgment or decree" within the meaning of 28 U.S.C. § 1257 (Petition, p. 5).

GAC's Alleged "Harassment" of UNC

The Opposition attempts to portray UNC as a small and struggling local business, fighting for its very existence against the massive power of defendants allegedly seeking

* New Mexico has no analogue to 28 U.S.C. § 1292(a), permitting immediate appeals from injunctive orders, thus leaving prohibition as the proper procedure for review of an injunction such as this.

** *See, e.g., United States* v. *Woodbury*, 263 F.2d 784 (9th Cir. 1959); *United States* v. *International Business Machines Corp.*, 406 F. Supp. 184 (S.D.N.Y. 1975); *McKillop* v. *Regents of Univ. of Calif.*, 386 F. Supp. 1270 (N.D. Cal. 1975); *Lemelson* v. *Ampex Corp.*, 372 F. Supp. 708, 715 (W.D. Illinois 1974); *Chas. Pfizer & Co.* v. *Laboratori Pro-Ter Prodotti Therapeutici*, 278 F. Supp. 148, 154 (S.D.N.Y. 1967).

to destroy it by "piecemealing" and "vexatious" litigation against it throughout the country (*e.g.*, Opposition, pp. 21-22). However appealing this argument might be to a jury, it is utterly inconsistent with the facts.

First, UNC may not be Gulf or Royal Dutch Shell, but it is a substantial, thriving organization, which has, indeed, harbored ambitious plans to rival General Electric, Westinghouse, Babcock & Wilcox, and Combustion Engineering in the business of manufacturing reload fuel assemblies for nuclear reactors (Opposition, p. 7). A Delaware corporation headquartered in New York and with offices and plants in ten states, UNC is, in the words of its 1976 Annual Report

> "... [t]he nation's largest independent producer of uranium ... [and] ranks approximately third among all U.S. companies in terms of uranium production capability and reserves. In addition to its expanding uranium exploration, mining and milling operations, the company mines low sulphur steam coal and produces some oil and natural gas." 1976 Annual Report, p. 1.*

Also according to its 1976 Annual Report, UNC has uranium reserves of 86,900,000 pounds (having a present market value of well over three billion dollars) (pp. 2, 6). Its 1976 reported revenues were over $105,000,000 and its net earnings over $8,000,000 (p. 3). A publicly-held company with over 17,000 stockholders (p. 2), its stock is traded on the New York Stock Exchange and other major exchanges.

Secondly, it bears emphasis that it was *UNC* that entered into each of the several utility contracts now the subject

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* A copy of UNC's 1976 Annual Report has been lodged with the Clerk of this Court.

of allegedly "vexatious" litigation from which UNC successfully sought protection in the local New Mexico court. Even the Opposition concedes (Opposition, p. 7) that UNC itself executed contracts with both I&M and Commonwealth Edison and "letters of intent" with Detroit Edison and Duke Power. Having deliberately embarked on this ambitious commercial enterprise, involving hundreds of millions of dollars in sales, with utility customers scattered around the United States, it is not unfair to UNC for GAC to seek UNC's participation in disputes with the utilities as to the extent of GAC's and UNC's obligations to supply uranium under the utility contracts and the 1973 Uranium Supply Agreement. It is particularly fair to require UNC's participation since (a) UNC remains directly liable to the utilities on three of the five contracts to supply the uranium required to perform those contracts (although this is ignored by the Opposition) and (b) under the 1973 Uranium Supply Agreement, UNC's obligations to supply uranium to GAC are for the most part defined in terms of GAC's obligations to supply uranium under the utility contracts. (*See* Petition, p. 8).

Third, it is a gross distortion to allege that GAC or its constituent partners "pursued a plan of piecemeal litigation on a coast-to-coast basis" against UNC (Opposition, p. 21). *Viz:*

> (a) GAC brought a statutory interpleader action *in the Federal District Court for New Mexico* seeking an overall single forum for consistent adjudication among it, UNC and all the utilities. Such consistent adjudication was not to UNC's liking, or that of the utilities, and the case was dismissed at their urging for lack of subject matter jurisdiction (Petition, p. 10).

(b) Gulf sued UNC *in the Federal District Court for New Mexico* seeking declaratory relief as to the effectiveness of a release given Gulf by UNC, but only after UNC, in a removed action which it voluntarily dismissed in that same federal court, had challenged that release (Petition, p. 9).

(c) GAC did *not* sue UNC in its suit against Commonwealth Edison in the Illinois state court seeking termination of the Commonwealth Edison contract pursuant to a cancellation provision (Opposition, p. 13).

(d) The only lawsuits outside of New Mexico in which GAC has expressed an intention to join UNC are those in which GAC was the unwilling defendant in an action by a utility (*i.e.*, Duke Power and I&M). Where GAC is sued by a utility seeking performance of a contract originally made with UNC and where UNC's obligation to supply uranium to GAC under the 1973 Uranium Supply Agreement is largely measured by GAC's duty to furnish such uranium in performance of the utility contract, GAC has taken the position that it is entitled to join UNC in the utility litigation in order to avoid being whipsawed between the utility in one forum and UNC in another. This is precisely why GAC wishes to join UNC in the I&M litigation against GAC in the New York federal court.

UNC's contentions of intentional "piecemealing" and "vexatious" litigation by GAC against UNC are sham.*

* It is UNC itself that practices the art of "piecemealing" when that suits its purposes. For example, UNC first initiated litigation concerning these disputes when it sued GAC in one New Mexico state court and I&M in another, although the underlying issues in each case are substantially similar and joinder of both in a single case was clearly indicated. UNC has successfully kept these disputes "piecemealed" in separate courts (Petition, pp. 10-11).

UNC's claim that litigation between GAC and the utilities are "in forums in which [UNC] has no interest, over issues which do not concern [UNC], with parties with whom [UNC] has no quarrel" (Opposition, p. 25) likewise is a sham. On September 9, 1976, GAC sought to intervene in UNC's separate litigation against I&M in the federal court in Albuquerque (Petition, pp. 10-11). In resisting such intervention, UNC's counsel affirmatively asserted, when it suited his purpose, that I&M's suit against GAC in the New York federal court "involves the same dispute" as *UNC v. I&M*, a position flatly inconsistent with UNC's position before this Court that the issues "do not concern" UNC and that I&M is a party with whom UNC "has no quarrel". *See* Letter dated October 15, 1976, from Harry L. Bigbee, Esq., to The Honorable Edwin L. Mechem, United States District Judge for the District of New Mexico. *See* Appendix E hereto.

And in any event, the federal courts have ample power—by way of stay, transfer, coordinated discovery, and appropriate sanctions—to deal with genuine problems of vexatious, "piecemeal" and harassing litigation, if UNC could demonstrate that such problems exist.

Alleged Lack of Need for GAC to Join UNC in the Utility Litigation

The Opposition (*e.g.*, pp. 16, 17, 36) belittles GAC's position that UNC's refusal to perform is a defense or that GAC has a valid right of impleader against UNC in the utility actions against GAC. UNC even suggests that "many courts" have "uniformly rejected" GAC's claims. All of this too is completely untrue.

It is not true, as the Opposition states (p. 26) that "[i]t is no defense to a suit on a contract to assert that a third party has failed to supply goods to the defaulting supplier". Such a defense of course exists under an appropriate *force majeure* clause and even absent such a clause, a supplier such as GAC may have a commercial impracticability defense under Section 2-615 of the Uniform Commercial Code where the agreed upon or assumed source of supply refuses

to deliver.* Here the understood source of the uranium for performance of the UNC-I&M Contract was UNC. Indeed, UNC concedes (Opposition, p. 16) that certain of its uranium ore reserves were specifically dedicated to performance of that contract.

Even more importantly, the 1973 UNC Uranium Supply Agreement specifically provides that UNC shall sell to GAC certain uranium which GAC "is required to supply pursuant to the [UNC-I&M Contract] . . . in accordance with the terms and conditions, including price, of [that Contract] . . ." (Petition, p. 8). In short, UNC has agreed in substance to indemnify GAC in respect of its obligations to supply uranium to I&M. This is a classic case of impleader to ensure, as Professor Moore puts it, that there will be obtained "consistent results from identical or similar evidence". 3 Moore, Federal Practice ¶ 14.04 at 14-189 (1974). UNC, of course, wants to stay out of the *I&M* v. *GAC* litigation in the hopes of convincing the Santa Fe Court (no matter what the court in *I&M* v. *GAC* may hold to the contrary) that GAC was not "required" to supply uranium under the terms of the UNC-I&M Contract.

Not a single court has held that UNC's refusal to perform does not excuse GAC's nonperformance. Not a single court has held that GAC does not have the right to implead UNC in order fully to protect itself in the utility actions against GAC. All that the courts have so far held (we think mistakenly) is that a *utility* may litigate against GAC alone and the *utility* is not compelled to join UNC as an indispensable party.

The provisions of the Federal Rules providing for impleader and permissive joinder are designed to permit

* GAC contends that the *force majeure* clauses in the contracts with the utilities excuse it from performance by reason of UNC's failure to perform. GAC also has raised the commercial impracticability defense in its litigation with the utilities.

efficient and consistent resolution of common issues arising from the same transactions or occurrences. 3 Moore, Federal Practice ¶ 14.04 at 14-189 (1974); 3A Moore, Federal Practice ¶ 20.12 at 2721 (1974). No court has held that GAC is not entitled to avail itself of the benefit of those provisions. The only ruling preventing GAC from impleading or joining UNC as a defendant is the Injunction at issue here.

Finally, it is clear that the Injunction, by depriving GAC of the use of those provisions of the Federal Rules designed to promote the resolution of common controversies in a single forum, will increase rather than decrease the burden of litigation in federal courts. The result will indeed be "piecemeal"and quite possibly inconsistent adjudications, waste of time and effort of parties and courts alike in duplicative discovery and trials and, at the end, increased likelihood of appeals from and collateral attacks on whatever judgments may be reached.

The Mandate of Donovan

UNC attempts to circumvent this Court's holding in *Donovan* in two ways. First, UNC repeatedly recites GAC's alleged "vexatious" and "harassing" litigation against UNC as a ground for the Injunction. The flaw in this approach (aside from its inconsistency with the facts, as demonstrated above) is that it is irrelevant. UNC seems to assume that the dissent in *Donovan,* not the majority decision, was the opinion of this Court. In fact, unlike the instant case, *Donovan* presented an extremely sympathetic case for permitting a state court to enjoin the institution of harassing federal proceedings. *See* Note, *State Injunction of Proceedings in Federal Courts,* 75 Yale L. J. 150, 158 (1965). Yet this Court squarely rejected all contentions of

harassment as irrelevant under the Supremacy Clause. That concept of federal supremacy, deeply rooted in our organic law, should be reaffirmed here.

Second, the Opposition (p. 22) would construe *Donovan* as applying only to the "prosecution" of a federal action previously commenced but not to the "institution" of a new federal lawsuit.* This verbal quibble (though fallacious)** also is irrelevant. The holding of *Donovan* directly applies to institution of a new federal lawsuit. The fact is that Mr. Donovan went to jail for contempt solely because he *instituted a federal action after he had been enjoined* from doing so by the state court (Petition, p. 18). The parallel between this case and *Donovan* is exact.

Conclusion

The Injunction issued by the Santa Fe Court will not reduce or prevent litigation in the federal courts. To the contrary, by interfering with GAC's right to invoke the protections of the Federal Rules of Civil Procedure to the same extent as any other defendant in a federal civil case, the Injunction can only add to the burden of the federal

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* The Opposition (p. 24) attempts to distinguish *Donovan* by attributing to Mr. Justice Black in *Donovan* the statement that an injunction would be appropriate where "jurisdiction has not yet attached". The quoted language does not appear anywhere in Mr. Justice Black's majority opinion.

** In fact, the term prosecution "includes every step in action, from its commencement to its final determination", *Black's Law Dictionary, Revised,* 4th ed. 1385 (West Publishing Company, 1968). It means the "institution and carrying on of a suit or proceeding . . .", *Webster's Third New International Dictionary* 1820 (Unabridged) (G. & C. Merriam Company, 1961). The term "clearly imports a beginning and an end", *Bradley* v. *United States,* 410 U.S. 605, 609 (1973).

courts. It will increase the likelihood of piecemeal litigation, complex motion practice and inconsistent judgments and multiply the possibility of appeals, remands and retrials. For this reason and for the other reasons stated above and in the Petition, GAC's Petition should be granted.

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APPENDIX A

Excerpts from Brief of Real Party in Interest, United Nuclear Corporation, in *General Atomic Company, etc.* v. *The Honorable Edwin L. Felter, etc.* in the Supreme Court of the State of New Mexico, dated May 26, 1976 ("UNC Supreme Court Brief").

P. 1

POINT I

THE DISTRICT COURT HAD JURISDICTION TO ENJOIN GENERAL ATOMIC FROM INSTITUTING ACTIONS IN FEDERAL COURT.

• • •

Pp. 7-9

Federal actions pending against United were not enjoined. The court acted within its jurisdiction in issuing the injunction and the alternative writ should be quashed.

POINT II

PROHIBITION OR SUPERVISORY CONTROL ARE NOT SUBSTITUTES FOR APPEAL AND CANNOT BE USED TO REVIEW THE CORRECTNESS OF THE TRIAL COURT'S DECISION.

• • •

Insofar as the injunction runs against state court litigation and arbitration proceedings, General Atomic is seeking review of the merits of the injunction. This is not the function of prohibition.

The purpose of prohibition is *not* to restrain a lower court from making an erroneous decision or to correct an erroneous decision already made, but, instead, is used to prevent a court from acting where it has no jurisdiction or is acting in excess of the jurisdiction it does have. *State ex rel. Prince* v. *Coors,* 52 N.M. 189, 194 P.2d 678 (1948); *State ex rel. Harvey* v. *Medler,* 19 N.M. 252, 142 P. 376 (1914). There is no doubt that the District Court had

jurisdiction to enjoin the institution or prosecution of state litigation or arbitration proceedings. General Atomic questions only whether United made a sufficient showing of vexation and harassment to justify the issuance of the injunction. That question should not be considered within the context of prohibition.

State ex rel. Miller v. *Tackett,* 68 N.M. 318, 361 P.2d 724 (1961), was a prohibition proceeding where a workmen's compensation claimant sought to prohibit a district judge from requiring that the claimant execute a medical authorization releasing medical information to the employer's attorneys. This Court held that the doctor-patient privilege statute applied and that the trial court exceeded its jurisdiction in requiring the release of the information. Relevant to this prohibition action is the statement in *Tackett* that:

> "The situation differs from that which is present where the court is given power and authority to do certain acts upon proof of good cause or other proper showing provided for in the statute. *If there is a question as to whether good cause has been established, or proper showing made, prohibition is not the proper mode for raising the issue since the court having the power to make the order was acting within its jurisdiction, and errors or mistakes made by it are reviewable only on appeal or by writ or error.*" 361 P.2d at 728 (Emphasis added).

Thus, we see that General Atomic is attempting to obtain a review on the merits of that portion of the injunction which is directed toward state litigation and arbitration proceedings. That kind of review is not the function of prohibition.

APPENDIX B

Excerpt from UNC's Response to Alternative Writ of Prohibition or Alternative Writ of Superintending Control in *General Atomic Company, etc.* v. *The Honorable Edwin L. Felter, etc.*, in the Supreme Court of the State of New Mexico, dated April 30, 1976.

Paragraph 12

Prohibition or supervisory control may not be appropriate methods for testing the correctness of a Rule 19 decision. Petitioner's remedy may be by appeal and thus this action should be dismissed. This jurisdiction question is merely suggested to the Court as United desires a decision on the issues presented by the Petition.

APPENDIX C

Excerpts from tape recording of hearing on June 16, 1976, in Santa Fe, New Mexico, before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Mr. Eastham: . . . We submit that this ruling of *Donovan* is clear. A state court cannot enjoin a person from bringing or conducting or concluding an in personam federal court action. The injunction issued by Judge Felter did exactly this. Accordingly, the writ of prohibition should remain permanent insofar as the injunction purports to prevent General Atomic and all the other persons and entities enjoined in that order from taking action of any kind in federal court. As I stated, my point does not depend on the facts. It goes to a whole question of power. Now Mr. Robb will go into the other aspects of this matter. Thank you.

Mr. Robb: Your Honors, with the permission of the Court, I have prepared some abstracts from the record that I'm going to be referring to which is easier, I think, than having to dig up the page numbers. They're all exhibits that are in the record. Your Honors, in my part of the argument I expect to address the two other major points: the validity of the injunction insofar as it pertains to state court action or arbitration, and number 2, the validity of the order of the court in denying the motion to join utilities in the Santa Fe action.

Justice Montoya: Now that bothers me insofar as the writ of prohibition is concerned, whether prohibition is a proper remedy under the circumstances here. The judges are already asking of me, "How can we prohibit it now?"

Mr. Robb: Well, I think from a technical standpoint the question of prohibition or whether the court acts under a superintending writ of control, I think probably it more

likely and more largely follows in that latter category, Mr. Justice. I think that the . . .

Justice Montoya: It couldn't follow under the writ of prohibition. I mean that's obvious.

Mr. Robb: Yes, I think there is a problem with prohibition because what we are saying here is—we are not saying the court lacks jurisdiction to do this, we are saying it shouldn't have done it, that it was improper for it to have done so, and I think prohibition more properly . . .

Justice Montoya: Isn't the proper remedy then appeal?

APPENDIX D

Excerpts from Transcript of Hearing Before The Honorable Edwin L. Felter in the District Court for the First Judicial District, Santa Fe County, New Mexico, on April 2, 1976.

Mr. Thompson: . . . We want to make sure and we have admitted [sic] language to this effect, that we are not foreclosed, because obviously the plaintiff would not be foreclosed from demanding arbitration in this action.

It is also our position with regard to arbitration, in other actions, that likewise, the plaintiff if it so desires could participate in arbitration which is imminent. In North Carolina, in the Duke Power controversy, that if the plaintiff so chose to enter that action, and demanded arbitration, it could do so. But the proposed form of the injunction purports to prevent us from doing the same thing, and we would submit, that would be unequal treatment and not contemplated by the motion for the injunction.

So, again, we would ask that we not be deprived of the right to demand arbitration, since that has as its purpose, the saving of judicial time and what have you, and we think it would be inappropriate to foreclose.

The Court: Does United Nuclear have any objections to the terms of the preliminary injunction applying equally to them as it does to the defendants?

Mr. Bigbee: We have no objections.

Mr. Thompson: We summarize by stating that we believe that we should not be foreclosed, in spite of what the plaintiff has stated at this point.

The Court: Without making any ruling on your position, it seems to me that both parties should be in the same position, one should not have the privileges that the other does not have.

I cannot see how any injunction against litigation could apply to the Defendants unless it applied equally to the Plaintiff.

APPENDIX E

Letter from Harry L. Bigbee, Esq., to The Honorable Edwin L. Mechem, United States District Judge, United States District Court for the District of New Mexico, dated October 15, 1976.

[LETTERHEAD OF BIGBEE, STEPHENSON, CARPENTER & CROUT]

October 15, 1976

The Honorable Edwin L. Mechem
United States District Judge
Federal Building
Post Office Box 97
Albuquerque, New Mexico 87103

Re: United Nuclear Corporation v. Indiana & Michigan Electric Company and American Electric Power Service Corporation, Civil No. 76-561.

Dear Judge Mechem:

We have received General Atomic's Motion for entry of an order permitting intervention, proposed Order and Memorandum in support thereof.

We are unable to comprehend the rationale of General Atomic's argument that they are entitled to intervene. It seems plain to us that since the action is stayed, there is nothing in which General Atomic can intervene and nothing for United Nuclear to respond to. The dire consequences predicted by GAC simply cannot occur so long as the action is stayed.

We would also point out that United Nuclear is already engaged in litigation with General Atomic in the District Court of Santa Fe County, No. 50827. In that case, General

Atomic is enjoined from subjecting United Nuclear to vexatious and harassing litigation. Also, GAC and I&M are already engaged in litigation with each other in the Southern District of New York, No. 76 Civ. 881 (MEF). This lawsuit involves the same dispute that is the subject of GAC's attempted intervention here.

Because of the existence of the ongoing actions, GAC has more than adequate redress in those forums for its claimed injuries. Thus, we do not propose to respond to General Atomic's Motion to Intervene or Motion for an Order allowing intervention, unless directed by the Court to do so.

If this procedure is not acceptable, will you please let us know.

Very truly yours,

s/ Harry L. Bigbee
HARRY L. BIGBEE

HLB:dl
cc: Mr. Rogers Doering
Mr. John D. Robb